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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of)	MM Docket 93-155
)	
RICHARD BOTT II)	File No. BAPH-920917GO
(Assignor))	
)	
and)	
)	
WESTERN COMMUNICATIONS, INC.)	
(Assignee))	
)	
For Assignment of Construction)	
Permit of Station KCVI(FM),)	
Blackfoot, Idaho)	

TO: The Honorable Arthur I. Steinberg

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Richard P. Bott, II, by and through his attorneys, hereby submits as follows his proposed findings of fact and conclusions of law in the above-captioned proceeding, in support of his Motion for Summary Decision.

I. PROPOSED FINDINGS OF FACT

A. Preliminary Statement

1. Richard P. Bott, II ("Bott") obtained the Blackfoot construction permit after comparative hearing on the basis of his integration preference. See *Richard P. Bott, II*, 3 FCC Rcd 7094 (ALJ 1988) ("Initial Decision"). The construction permit was issued to Bott, after protracted appeals and further administrative processing by the Mass Media Bureau, on December 18, 1991.¹ On

¹ Radio Representatives, Inc ("RRI"), a competing applicant for the Blackfoot facility, appealed the Initial Decision, however, both the Review Board and the Commission affirmed the Initial Decision. *Richard P. Bott, II*, 4 FCC Rcd 4924 (Rev. Bd. 1989);

September 17, 1992, Bott tendered to the FCC the above-captioned application for the assignment of the Blackfoot construction permit (the "Assignment Application"). RRI petitioned to deny² the Assignment Application. Bott filed an opposition to the petition³ to which RRI filed a reply.⁴

2. By a Hearing Designation Order and Notice of Opportunity for Hearing, 8 FCC Rcd 4074, released June 15, 1993 ("HDO"), the Commission designated the Assignment Application for hearing on the following issues:

(a) To determine whether Richard P. Bott, II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.

(b) To determine, in light of the evidence adduced pursuant to issue (a), whether Richard P. Bott, II is qualified to remain a Commission permittee.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues,

Richard P. Bott, II, 5 FCC Rcd. 2508 (1990). RRI's subsequent appeal to the United States Court of Appeals, District of Columbia, similarly failed. *Radio Representatives, Inc. v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991). See, Joint Exhibit 1, received by Order, FCC 93M-700, released November 10, 1993.

² See RRI's Petition to Deny filed October 26, 1993. Mass Media Bureau Exhibit 3. (The Mass Media Bureau Exhibits shall hereafter be cited as "MMB Ex. ____".)

³ See MMB Ex. 4, Opposition to Petition to Deny, filed November 10, 1992.

⁴ See MMB Exhibit 5, Reply to Opposition to Petition to Deny, filed November 23, 1992. See also MMB Ex. 6, Bott's Request for Leave to Respond and Response, filed December 8, 1992.

whether the captioned application should be granted.

3. The hearing on the designated issues was held on October 26, 1993. The record was closed at the end of the hearing.⁵ At the close of the hearing, the Presiding Judge ordered that Proposed Findings of Fact and Conclusions of Law be filed on or before December 17, 1993. The Presiding Judge further ordered that Reply Findings, if any, be filed on or before January 13, 1993. By Order, FCC 93M-686, released October 29, 1993, the Presiding Judge granted Bott's request for permission to file the post-hearing Motion for Summary Decision with which these Proposed Findings of Fact and Conclusions of Law are submitted.

B. Misrepresentation/Lack of Candor Issue

a. Integration commitment

4. On December 7, 1987, a hearing was held to consider the proposals of three competing applicants for a construction permit for the Blackfoot, Idaho facility. During the Blackfoot hearing, Bott testified that, if he obtained the Blackfoot construction permit, he intended to move to the community of license and be integrated full-time into the management and operation of the station. He also testified that he had no intention of selling the Blackfoot station but intended to own and operate the station for *an indefinite period of time. MMB Ex. 1; MMB Ex. 2, pp. 73, 77-

⁵ The Presiding Judge, by Order, FCC 93M-700, released November 10, 1993, reopened the record for the limited purpose of admitting into evidence Joint Exhibit No. 1: Stipulation Re: Issuance of Construction Permit for Blackfoot, Idaho.

78.⁶

5. At the October 26, 1993 hearing on the Assignment Application Bott affirmed that it was his good faith intention at all times after 1987 during the pendency of the Blackfoot application to move to Blackfoot and be fully integrated into the management of the station. It remained his intention to move to Blackfoot and be fully-integrated until he decided to sell the CP in 1992. Transcript 84, 180.⁷

6. Bott's Blackfoot application was filed in July 1985. Tr. 89. Bott selected Blackfoot from the list of communities in the FM universal filing window notice because it was a Class C facility, offering a significant business opportunity, located in an underserved market and in an area of the country in which he would enjoy living and working. Tr. 144. Bott did not conduct a formal study of the Blackfoot market. Tr. 145.

7. At the time he filed the Blackfoot application, Bott had not decided whether he would move to Blackfoot and be integrated full-time into the operation of the station. Bott elected to propose full integration in the Blackfoot proposal in the summer of 1987 when both the Blackfoot application and his concurrently pending application for a new FM station at Central Valley,

⁶ MMB Ex. 1 is Bott's Integration Statement in the 1987 comparative proceeding. MMB Ex. 2 is the transcript of Bott's testimony given in the December 7, 1987 comparative hearing.

⁷ All further references to pages of the transcript of this proceeding will be indicated as follows: "Tr. ___." Any references to the 1987 Blackfoot comparative hearing transcript will be indicated by a reference to the relevant page(s) of MMB Ex. 2.

California⁸, were designated for hearing. Bott Ex. 3, p. 14; MMB Ex. 4, p. 11, Tr. 151. Bott made this decision based upon his assessment that the proposed Class C Blackfoot facility would be a more complicated operation with a substantially broader coverage area⁹ and had a better "long-term profit potential" than the proposed Central Valley Class A station. Bott also felt he would better like to live in the Snake River Valley where Blackfoot is located. MMB Ex. 2, p. 24; Tr. 85, 149-50. At the time he made the commitment to move to Blackfoot, he had never been to Blackfoot but had vacationed in and was familiar with and enjoyed the Rocky Mountain area generally. Tr. 85-86, 152. Bott has no family or friends in Blackfoot. MMB Ex. 2, p. 72. Bott did not intend to maintain a residence anywhere other than in Blackfoot.¹⁰ MMB Ex. 2, p. 73. Bott viewed the Blackfoot proposal as an opportunity to break away from the family business and to start and run his own business, to do his own programming and operate his own stations.

⁸ Bott considered filing construction permit applications for a number of the communities for which a universal filing window had been opened by the FCC. He selected Blackfoot and Central Valley after considering the coverage of the proposed facilities, the populations, the number of stations and the competitive situation in these markets. Based upon these considerations, Bott felt that these communities provided viable economic markets for a successful radio business venture. MMB Ex. 2, p. 86.

⁹ According to Bott, the Blackfoot station would essentially serve two markets (population centers), Idaho Falls and Pocatello, rather than merely the city of license. Tr. 85.

¹⁰ During the pendency of the Blackfoot application, and until the summer of 1993, Bott lived in a rental apartment in Kansas City. During the summer of 1993, Bott purchased and moved into a new home in a suburb of Kansas City. Tr. 78. Bott has never been married. Tr. 142.

MMB Ex. 2, p. 51, 68; Bott Ex. 3, p. 14; MMB Ex. 4, p. 11.¹¹

8. Bott visited Blackfoot in September 1987, after he submitted to the FCC his proposal to move to Blackfoot and be integrated full-time into the management of the Blackfoot station and before the comparative hearing, to acquaint himself with the community to which he planned to move. While in Blackfoot he looked into housing and studio opportunities with a real estate agent, met with community leaders,¹² visited his then designated tower site, and met with the site manager. MMB Ex. 2, p. 86-87; Tr. 91-94. He did not make a commitment to rent or purchase a particular house or studio space at that time but visited potential housing and studios to determine general availability. Tr. 93-94.¹³ He has not returned to Blackfoot since the issuance of the construction permit, Tr. 94, but intended to return to Blackfoot after finalizing his antenna plans with the owner of his site, to work on his studio and other arrangements. Tr. 175.

¹¹ Bott followed in his parents' footsteps in this regard. His parents had previously worked for another station with a rhythm and blues format and elected to go out on their own, to purchase a station with a popular music and news format. Tr. 131.

¹² He met with the mayor of Blackfoot, as well as representatives from the job bank, a potato packaging company (one of the largest employers in the area), and the Bureau of Indian Affairs. He also obtained literature on the city, its attributes and activities and familiarized himself with types of community needs. Tr. 152-54. He told the people with whom he met that he was planning to build a radio station in Blackfoot and he discussed with them community service and public affairs and areas in which the radio station could help the community but did not discuss formats. Tr. 154.

¹³ He learned at that time that obtaining office space and studio space for the station and a residence for Bott was not going to be a problem. Tr. 99.

9. Although the grant to Bott became final in the spring of 1991, the Blackfoot CP was not issued to Bott until December, 1991. Tr. 88. Bott did not take steps toward commencing construction of the Blackfoot station until after the CP was issued because, as a result of his experience with the comparative hearing and all of the appeals in the Blackfoot proceeding, he was wary of taking any action until he had the CP in hand. Tr. 103-4, 170-71.¹⁴

10. After the final grant Bott did not lease or purchase studio space or a home in Blackfoot because he was more concerned with taking care of the antenna site arrangements. He believed that all other elements of the construction would follow from there. Tr. 99, 174-75. In January 1992, Bott contacted the site agent, the Bureau of Land Management, to obtain an updated site management plan in order to assure himself that his tower plans were in compliance with the plan. He had discussions with the users group to determine whether a more advantageous tower site was available. He attempted to determine whether to side mount the antenna or to use a combiner and broadcast his signal and the signal of the other station operating from the tower through one antenna. In so doing, he consulted with his consulting engineer

¹⁴ Bott felt that until all appeals had been exhausted by RRI, and his uncle Norwood Patterson, he could not be certain of the finality of his grant. Tr. 103. Despite Bott's frustration at the long delay in obtaining the CP, Bott's interest in the facility never waned. Tr. 155-56. After he was advised by his then counsel in March 1991 that the appeals of the CP grant had ended, the FCC staff required the submission by Bott of a radiation hazard statement before the CP would be issued. Bott submitted that statement, prepared at his request by a consulting engineer, in October 1991. The CP ultimately was issued to Bott on December 18, 1991. Jt. Ex. 1.

and an equipment supplier. Tr. 95, 108-109; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11. Ultimately, Bott contacted Mr. Frandsen, the tower owner, to make arrangements for his antenna installation. Tr. 96, 108. In January 1992, Bott also sought and received from the FCC authorization to use the call sign KCVI for the Blackfoot facility. Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.

b. Format Decision

11. Bott testified during the Blackfoot comparative hearing that he had not yet made a format decision for the Blackfoot station. MMB Ex. 2, p. 56, 90. Bott indicated he wanted to keep his options open and would adopt a format "tailored to [the Blackfoot] market and the needs of that community." Id. at 56.¹⁵ At the hearing on the Assignment Application, Bott recalled and confirmed his testimony in the comparative hearing that he had not made a format decision at the time of the hearing. Tr. 86-87, 150. Bott testified in the comparative hearing that he would consider satellite fed programming, including some of the programs currently received by Bott Broadcasting and Bott Communications in the event that such programming was compatible with whatever format he

¹⁵ In considering Blackfoot, Bott reviewed the Broadcasting Yearbook listings for existing stations and formats in the market. He cannot recall whether there was a religious or commercial religious station in the market in 1985. Tr. 148-49. However, format was not an overriding concern since formats change over time. Tr. 145. When he filed for Blackfoot he had no specific or general idea how he would format the station. Tr. 145-48. His hope was to build a facility which, through the sale of radio time, would be a profitable business enterprise. He expected to make it profitable by finding an audience (a market niche) which was unserved, caring for that audience, developing a loyal audience and then marketing that audience to advertisers and others interested in reaching the audience. Tr. 147-48.

subsequently chose, but had not decided to do so. MMB Ex. 2, p. 63, 90. Any programming that he ultimately selected for the Blackfoot station would be selected for his own benefit and the benefit of the Blackfoot listenership and not for the benefit of Bott Broadcasting Co. or Bott Communications, Inc. MMB Ex. 2, p. 64. As of the time of the Blackfoot comparative hearing, Bott had had no specific discussions with his father relating to how Bott would program his station. MMB Ex. 2, p. 68. The discussions Bott had with his father were more general and never discussed a specific format. His father, having many years of broadcast experience was a constant source of information for him. His father was concerned that Bott consider the full array of format options available including all the newly developing satellite formats. Tr. 131. Bott intended to make his station independent of Bott Broadcasting Company. Tr. 129.

12. Realizing that a substantial period of time would elapse before the station would go on the air, Bott did not want to make a format decision prematurely, preferring instead to keep his format options open. Tr. 87-88; Bott Ex. 3, p. 1. While all of Bott's broadcast experience, except for his experience with college campus carrier station WBJU, has been with Bott family-owned broadcasting companies and their stations,¹⁶ MMB Ex. 9, p. 2, all

¹⁶ Bott is an officer, director and 20% stockholder of Bott Communications, Inc. He is also an officer, director and employee of Bott Broadcasting Co., Inc. Bott's parents, who have indicated no intent to retire from the broadcast business, jointly own Bott Broadcasting Company. Bott Broadcasting Company owns 80% of Bott Broadcasting Inc. These family owned corporations own a number of radio stations, all of which operate with a commercial religious

of which operate commercially with a format of religious programs together with news and information, Tr. 128, Bott's knowledge of radio formats and their economics is far broader. Tr. 160-63. This knowledge and experience and his contacts in non-religious commercial broadcasting provided the basis for Bott's belief that he could operate with any commercial format under the right circumstances. Tr. 138-40.¹⁷ Bott knows several individuals who have operated commercial religious stations that have operated successfully with other commercial formats. Tr. 180-81. For example, his father, Richard Bott, began his broadcasting career working for a rhythm and blues station, and then operated a very successful popular music station. Tr. 130-31.

13. After the Court of Appeals decision became final in February or March 1991, Bott began the decision-making process to determine what format to use on the station. He considered this decision through the summer of 1991. Tr. 91, 109, 157. In making his decision he considered the market generally, the number and formats of stations in the market, and what viable format openings existed in the market. In addition to matters related to the market specifically, Bott considered the state of the national economy and the radio broadcast industry overall. Through reading

format. Tr. 126-128, 143; MMB Ex. 9.

¹⁷ According to Bott, the right circumstances include consideration of market specific (e.g., number of stations, existing formats and community service attributes) and economic factors. Bott feels that economic considerations are foundational - if the station cannot operate at a profit it will not remain in existence. Tr. 139-40.

newspapers, magazines and various trade publications, he became acutely aware that the national and regional economies as well as national and Rocky Mountain regional radio business were depressed. Tr. 91, 157; Bott Ex. 3, pp. 2, 8, 15.

14. Bott decided to adopt a commercial religious format, largely because of the depressed state of the economy and the downturn in the radio industry. Tr. 109-110, 118, 159; MMB Ex. 4, p. 10. The other formats that he considered¹⁸ relied substantially upon spot advertising. Based upon his experience with commercial religious broadcasting, he understood that a commercial religious format relied primarily upon the sale of blocks of time rather than spot advertising sales. Bott felt that, although a commercial religious format does not maximize the profit potential of a station, a commercial religious format stands a greater chance of being economically viable in a depressed economy. Tr. 109, 112, 162-63. No other station operating in the market that the Blackfoot station would serve had a commercial religious format in the summer of 1991. Tr. 166. Bott believed that he could make a success of operating the Blackfoot station with a commercial religious format. Tr. 112; Bott Ex. 3, p. 3.

15. While attending a regional religious broadcasters

¹⁸ Some of the formats that he considered were: Satellite Music Network formats, Unistar formats, soft adult contemporary, adult contemporary, Z-rock, contemporary hit radio, talk radio, and business radio. Tr. 109, 160. While he was aware of many formats in 1985 when he applied for Blackfoot, the one significant factor that stood out in 1991 when he made his format decision was the depressed state of the economy and the indications that it would get worse rather than better. Tr. 163-64.

convention in September 1991, Bott learned from a time buyer, Teresa Rivera, that the Calvary Chapel Church had recently purchased a station in Chubbock, Idaho, and was planning to go on the air with a commercial religious format. Tr. 112-13, 165-68; Bott Ex. 3, p. 3; MMB Ex. 4, p. 10. Bott was immediately concerned. Tr. 113. Based upon Rivera's representations regarding the station's coverage, his subsequent discussions with Lou Phelps, who had moved to Pocatello to operate the station, regarding the station's plans to increase power,¹⁹ his knowledge of broadcast concepts generally and his experience with specific stations, Bott believed that, despite the fact that KCVI might have a larger coverage area overall, the Chubbock station's signal would serve substantially the same market that his Blackfoot station would try to serve, from Idaho Falls in the north to Pocatello in the south. Tr. at 113-17, 119; Bott Ex. 3, p. 3-4, 15; MMB Ex. 4, p. 10.²⁰ Bott believed that two commercial religious stations would not be viable in the Idaho Falls-Pocatello market considering its size and demographic make up. Tr. 169. The Chubbock station was in a position to be on the air before KCVI. Tr. 118; Bott Ex. 3, p. 3, 15; MMB Ex. 4, p. 10. Bott was very distressed.²¹ He considered

¹⁹ Phelps advised Bott that the Chubbock station was seeking to increase power from a mountaintop site. Tr. 114.

²⁰ Bott's belief that the signal of Calvary Chapel's commercial religious station would reach the Idaho Falls-Pocatello market was ultimately shown to be correct. Bott Ex. 2.

²¹ This station, KRSS, planned to broadcast many of the same programs Bott had intended to use. Tr. 167. There are only a finite number of programs available. Even if Bott had sold time to competitive programs, the audience would have been split. Given

format alternatives but, faced with a start up operation in a very depressed economy, he believed that he would be financially unsuccessful operating a new radio station with a format relying heavily upon spot advertising. Tr. 118. He continued with his plans to build the station (Tr. 108-09) in the hope that either the economy would turn around and an alternative format would become viable or that the Chubbock station might not be able to effectuate its power increase proposal. Tr. 118-19, 176; Bott Ex. 3, p. 16; MMB Ex. 4, p. 11.²²

16. In the spring of 1992, Mr. Frandsen, the tower owner, indicated that if the FCC ever changed its duopoly rules, which at that time prevented him from owning another FM station in the market, he would be interested in purchasing Bott's Blackfoot CP. Tr. 111, 121. Bott advised Frandsen that his CP was not for sale and that he intended to move to Blackfoot, and to construct and operate the station. Tr. 111. Bott had not considered selling the CP at any time prior to his discussion with Frandsen. Id. In a subsequent conversation with Frandsen, Frandsen again indicated his interest in purchasing Bott's CP. Bott realized that a duopoly operation of KCVI with all of its inherent economies might be the best way of successfully operating the station, Tr. 121, 177. As a result, Bott discussed whether he could sell the permit with his

the size and demographics of the market, Bott believed he could not sustain a viable operation. Tr. 169-70.

²² The Chubbock station, KRSS(FM), was eventually authorized to operate with increased power. KRSS went on the air from its new facilities on April 6, 1992. See MMB Ex. 6, p. 2.

counsel, Harry Martin. Martin advised Bott that he could sell the permit for his expenses. Tr. 121-22, 180. Having concluded that his proposed Blackfoot station was no longer an economically viable business venture, and with his attorney's advice that he could sell the permit for his expenses, Bott agreed to sell it to Mr. Frandsen's company, Western Communications, Inc. Tr. 180. Neither the Administrative Law Judge in the Blackfoot hearing nor Bureau counsel nor opposing counsel ever suggested to Bott that his belief that the Blackfoot proposal would be economically viable and become a successful business venture, was an improper basis for pursuing the CP. Tr. 183.²³ The Assignment Application was filed with the Commission on September 17, 1992.

c. The Pre-Designation Pleadings

17. RRI filed its Petition to Deny the Assignment Application on October 26, 1992, contending that "the assignment application must be designated for hearing pursuant to 47 C.F.R. §73.3597(a) because Bott proposes to assign his construction permit within one year of its grant, thus abandoning his commitment made a hearing to relocate to Blackfoot and integrate ownership and management." HDO, ¶3 (footnote omitted). RRI further contended that a grant of the assignment application "would undermine the Commission's licensing process." HDO ¶5. In opposition, Bott stated in his declaration

²³ In the 1987 comparative hearing, Bott testified that: "I looked at the population. I looked at the competitive situation, the number of stations that were there and I determined that each of those [Blackfoot and Central Valley] would be economically viable in terms of making a successful business venture of it and being able to serve those communities." MMB Ex. 2, p. 86.

of November 9, 1992, that throughout the comparative hearing process "... it remained [his] intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when [he] received the CP." Bott Ex. 3, p. 14. Bott's opposition declaration also stated after the CP grant was affirmed by the Court of Appeals in February, 1991, he proceeded with more detailed planning for the station, and he "decided that [he] would operate the station with a religious format." Id., at 14-15. Bott's opposition declaration further outlined the impact of information he received in September, 1991 about plans for station KRSS, Chubbock, Idaho. Bott's declaration further stated that into 1992 he proceeded with planning for construction of the station, ultimately contacting Mr. Kent Frandsen "to proceed with my plans to install my antenna on his tower." Id., p. 16. Finally, Bott's declaration stated that Frandsen inquired about purchasing the CP and, after Bott first rebuffed Frandsen's overture, Bott elected to sell the CP after his then attorney advised him that the FCC allowed him to do so provided that he receive as compensation only his expenses. Id. Bott stated in his declaration that he thought that in the poor economy a duopoly operation, as Frandsen would operate KCVI, represented the best hope for a successful operation. Id.

18. While the HDO asserts that in opposing RRI's petition to deny, Bott stated "that throughout the six-year effort to obtain his permit he maintained a good faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a

religious format," HDO, ¶3, Bott's opposition declaration does not so state. The Mass Media Bureau acknowledged that "it does not possess a copy of any written statement or transcript of an oral representation by Bott to the Commission in which Bott asserts that throughout the six-year effort to obtain his permit he maintained a good faith intention to operate KCVI as a commercial facility with a religious format or that throughout the comparative proceeding, he always intended to operate with a commercial religious format." Bott Ex. 1, p. 4-5.

19. Bott testified that the declarations he gave in this proceeding and the testimony he gave in the comparative proceeding about his intentions to move to Blackfoot and be fully integrated into the management and operation of the Blackfoot station were truthful and did not contain misrepresentations nor lack candor. Bott Ex. 3, p. 4.

II. CONCLUSIONS OF LAW

Issue (a): Misrepresentation/Lack of Candor

20. Under this issue it is to be determined whether Bott misrepresented facts to or lacked candor with the Commission, either in his comparative hearing integration pledge or in his opposition to RRI's petition to deny in this proceeding. In its discussion in the HDO leading to designation of this issue, the Commission said:

The hearing record does not reveal any qualification to Bott's [integration] pledges, such as being contingent on the practicality of introducing a commercial religious or any other particular format. Moreover, in his testimony at hearing, Bott made the following statements:

Q. Isn't it true that you also intend to engage in a (religious-oriented) format for the Blackfoot facility?

A. No, that's not necessarily true. I've not decided exactly the type of format, the type of music or whatever that I would use in that facility. It would be a format tailored to that particular market and the needs of that community.

(TR 61)

A. ...I've not chosen the exact format....
(TR 95). However, as previously noted in Paragraph 3, supra, Bott has represented in the instant proceeding that, throughout the comparative proceeding, he always intended to operate with a commercial religious format and that KRSS' adoption of an identical format dramatically changed the local market situation. HDO, par. 9.

At HDO par. 3 the Commission had said: "In response [to RRI's petition] Bott states that throughout the six-year effort to obtain his permit he maintained a good faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a religious format."

21. Thus, the HDO's single explicit identification of alleged misrepresentation concerned what the HDO asserted to be an inconsistency between Bott's statements in this assignment proceeding about his 1987 format intentions and his testimony at the 1987 comparative proceeding. Secondly, the HDO alleged at par. 11 that Bott's explanation for the sale of the KCVI permit (the circumstance of KRSS's choice of a commercial religious format and its plan to increase coverage and the impact of these developments on KCVI) lacked credibility because RRI had shown that KCVI's signal would cover substantially more area and people than would KRSS's signal.

22. As this record shows, Bott did not represent to the Commission in this assignment proceeding that he had in 1987 intended to broadcast a commercial religious format. The HDO is simply in error in that regard. Bott's statements and testimony in this proceeding are completely consistent with his 1987 comparative hearing representations and testimony as to a format decision. He had not chosen a format for the Blackfoot station at the time of the 1987 comparative hearing and did not make a decision as to his format until the summer of 1991. Bott testified as to the reasons for his ultimate choice of format, and that testimony is consistent with his declaration given in opposition to RRI's petition to deny.

23. As to the question of the "credibility" of Bott's explanation for the sale of KCVI -- KRSS's introduction of a commercial religious format and KRSS's planned signal coverage increase -- Bott testified in this proceeding that the market he

intended to serve with KCVI included at its northern and southern ends the two relatively large cities of Idaho Falls and Pocatello, respectively, and everything in between (including Blackfoot). He testified that he believed that KRSS with its improved coverage from its new mountaintop site would serve this same market, and he stated the basis upon which his belief was founded (including his experience with specific stations using mountaintop transmitter sites). Bott acknowledged that KCVI would probably have a larger total signal coverage area than KRSS, but he believed that KRSS would serve the same relevant market, Idaho Falls - Pocatello.²⁴ There is no basis for doubting the sincerity of Bott's belief.

24. In the 1987 comparative proceeding Bott had testified that in 1985 he selected Blackfoot as a market in which to seek an FM permit because he determined that the station "would be economically viable in terms of making a successful business venture of it and being able to serve the community." MMB Ex. 2, p. 86. In that proceeding and again in this proceeding he testified how he determined, in 1987, to commit to Blackfoot (rather than Central Valley, California) as the community to which he would move and where he would manage his radio station. Bott testified in this proceeding that, despite the deep concern and distress he felt when he learned of the plans of KRSS's new owners to broadcast a commercial religious format and to increase power, it nevertheless remained his intention to move to Blackfoot and be

²⁴ That Bott's belief about coverage of the Idaho Falls - Pocatello market by KRSS was correct was shown by an engineering report prepared after adoption of the HDO. Bott Ex. 2.

fully integrated in the management of KCVI up until the time that he decided, in 1992, to sell the permit to Western Communications, Inc. There is no evidence in this record contradicting Bott's testimony in this regard. To the contrary, what next follows supports Bott's testimony.

25. Although Bott had become convinced that, because of the advent of KRSS, he would be financially unsuccessful with KCVI unless either the overall economy improved (which he did not see happening) or KRSS failed to implement its planned power increase, he nevertheless continued with his plans to construct KCVI. While Bott first learned of KRSS's plans in September, 1991, he took steps in October, 1991 to complete FCC processing requirements for the issuance of his permit, and after the permit was issued on December 18, 1991, he took steps, in early 1992, with the Bureau of Land Management and with his consulting engineer towards completing his antenna installation arrangements. He also sought and received the call sign KCVI. It was in the next, and final, steps toward finalizing KCVI's antenna installation that the possible sale of the permit first arose. Western Communications, Inc.'s owner (Mr. Kent Frandsen) suggested to Bott that Frandsen would be interested in acquiring the permit. Bott responded, when this first was raised by Frandsen, that the CP was not for sale; that Bott intended to build and operate the station. However, when Frandsen subsequently renewed his statement of interest, Bott, considering his view of the prospects for KCVI under his ownership and the potential for KCVI in a duopoly ownership under Frandsen, sought

the advice of his then counsel, Harry Martin, as to whether he could sell the KCVI permit. Martin advised Bott that he could sell the permit for his expenses. Thereafter, Bott entered into the agreement with Western Communications, Inc. for the assignment of the KCVI permit, which in turn led to the application in this proceeding.

26. In HDO par. 11 the question is asked "why, if Bott previously represented that he intended to proceed without having chosen a particular format, the format issue became so critical later." This does not suggest that Bott ever testified that he would not use a format, only that he had not yet chosen one in 1987. Bott's testimony in this proceeding is that he chose a format in 1991 as part of his preparation for the station, and that considerations of finding a format which would produce an economically viable station in the nationally and regionally depressed economy were of major importance. Bott's testimony is that he, even then, kept his options open as to format choice and would have proceeded with a format other than commercial religion if economic conditions had improved and led him to believe such a format could be economically viable. He did not, however, see the likelihood of economic improvement in 1992 when he agreed to sell the permit. This testimony is not in conflict with his 1987 comparative testimony, or with his declaration in this assignment proceeding.

27. In summary, there is no basis for concluding from this record that Bott misrepresented facts to, or lacked candor with,

the Commission in his comparative hearing integration pledge or in opposing RRI's petition to deny.

Issue (b): Bott's Qualifications to Remain a Permittee.

28. In light of the conclusion reached under Issue (a) -- that Bott has not misrepresented facts to or lacked candor with the Commission -- this issue, to be determined "in light of the evidence adduced pursuant to issue (a)," must be resolved in favor of Bott.

29. The fact that Bott is seeking to sell an unbuilt permit which he obtained as the result of a comparative hearing does not adversely reflect on his status as or qualifications to be a permittee. The assignor in Eagle 22, Ltd., 7 FCC Rcd 5295 (1992) was situated exactly as is Bott, and was not found by the Commission to have, because of the proposed sale of its unbuilt permit, jeopardized its standing as a permittee.

Issue (c): Grant of the Assignment Application.

30. This issue states that it is to be decided "in light of the evidence adduced pursuant to the foregoing issues." Issue (a) must be resolved in favor of Bott, and therefore so must issue (b) and, ultimately, this issue (c). In the absence of misrepresentation or lack of candor by Bott, grant of this application is consistent with rule (§ 73.3597(c)) and case precedent (Eagle 22, Ltd., supra).²⁵

²⁵ In Eagle 22, Ltd., as here, the construction permit being assigned was awarded in a comparative hearing. § 73.3597(c) does not exclude permits won comparatively; it applies to all unbuilt stations.

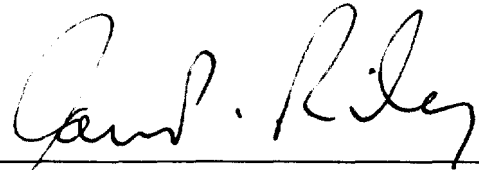
31. The Presiding Judge should conclude that HDO par. 12, which might appear to suggest a different outcome, is properly read as dicta. It addresses the dispute between Bott and RRI, summarized in HDO par. 6 and 7, over whether, if § 73.3597(a) did apply to this application, the changed competitive circumstance described by Bott would satisfy § 73.3597(a)(4). The Commission's resolution of that dispute is found in HDO par. 12 but, because the Commission in HDO par. 8 found that § 73.3597(a) does not apply to this application, HDO par. 12 does not limit the Presiding Judge's authority to grant the KCVI assignment application.

CONCLUSION

In view of the foregoing Proposed Findings of Fact and Conclusions of Law, all issues should be resolved in favor of the applicant and the pending application for assignment of the KCVI permit should be granted.

Respectfully submitted,

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